LIBRARY
SUPREME COURT, U. S.

Nos. 642, 688, 691, 813, 814 and 815.

In the Supreme Court of the United States.

OCTOBER TERM, 1968.

ERIE-LACKAWANNA RAILROAD COMPANY ET AL.,
Appellants,
v.
THE UNITED STATES OF AMERICA ET AL.,
Appellees,
AND CONSOLIDATED CASES.

ON APPEALS FROM UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS AND STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

HAROLD M. MULVEY,
Attorney General,
State of Connecticut,
SAMUEL KAHEL,
Special Assistant Attorney General,
Attorneys for the State of Connecticut,

EDWARD W. BROOKE,
Attorney General,
Commonwealth of Massachusetts,
DAVID BERMAN,
Assistant Attorney General,
Attorneys for the Commonwealth of Massachusetts,

J. JOSEPH NUGENT,
Attorney General,
State of Rhode Island,
ROBERT M. SCHACHT,
Assistant Attorney General,
Attorneys for the State of Rhode Island and Providence Plantations.

Of Counsel:
JOSEPH L. TAUBE,
Special Assistant Attorney General,
Commonwealth of Massachusetts,
WILLIAM J. LYNCH,
Assistant Director,
Connecticut Transportation Authority,
State of Connecticut,
F. MICHAEL AHERN,
Assistant Attorney General,
State of Connecticut,
DAVID B. BUTLER,
Assistant Attorney General,
State of Connecticut,
ROBERT L. HIRTLE,
Assistant Attorney General,
State of Connecticut.

ALBERT C. SHEPARD & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

I. Introduction	1
II. Question presented	2
III. Statement	2
IV. Interest of the parties	2
Connecticut	3
Rhode Island	3
Massachusetts	4
V. Argument	8
The District Court neither abused its discretion nor committed an error of law in refusing to issue an injunction	8
VI. Conclusion	14
Appendix	16

Table of Authorities Cited.

Cases.

New York Central Securities Corp. v. United States, 287 U.S. 12	13
New York, New Haven & Hartford Railroad Co., Trustees, Discontinuance of All Interstate Passenger Trains, 327 I.C.C. 151	7, 11, 12
Pennsylvania Railroad Company—Merger—New York Central Railroad Co., 327 I.C.C. 475	7, 9n. 11

Statutes.

11 U.S.C. § 204	11
49 U.S.C. §§ 5(2)(b), 5(2)(c)	8

In the
Supreme Court of the United States.

OCTOBER TERM, 1966.

Nos. 642, 680, 691, 813, 814 and 815.

ERIE-LACKAWANNA RAILROAD COMPANY ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA ET AL.,

Appellees,

AND CONSOLIDATED CASES.

ON APPEALS FROM UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS AND STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

I.

Introduction.

The briefs of the appellants and the appendices thereto contain adequate jurisdictional statements, statements of prior proceedings and notations of the statutes involved.

II.

Question Presented.

Did the United States District Court abuse its discretion or commit an error of law in refusing to enjoin an Interstate Commerce Commission order which, without requiring a complete, presently-in-force protective scheme for other admittedly affected railroads, authorized the merger of the Pennsylvania and New York Central Railroads and required the inclusion of the bankrupt New Haven Railroad?

III.

Statement.

A correct statement of facts is found in the brief of the Trustees of the New Haven Railroad.

IV.

Interest of the Parties.

The three states joining in this brief have been parties to the proceedings before the Interstate Commerce Commission and the United States District Court from the outset, and now appear before this Court to support the only practical method of insuring the continuance of the essential public service provided by the bankrupt New Haven Railroad, namely the prompt inclusion of this vital railroad system in a merged Penn-Central system. The Interstate Commerce Commission has made this inclusion a condition of (but not a condition precedent to) the merger.

The general importance of the New Haven Railroad to the economy of Southern New England and the northeast rail corridor is discussed in the New Haven's brief. Some

additional discussion of New Haven's importance to these three states seems desirable.

Connecticut.

Connecticut is a highly industrialized state with 44 per cent of its labor force and 16 per cent of its population employed in manufacturing industries. On a *per capita* basis it ranks first among states in military prime contract awards, and it ranks second in per cent of income derived from manufacture. (Appendix B to Br. of D&H, p. 274.)

With the exception of south-north service from New London on the Central Vermont, Connecticut relies exclusively on New Haven for moving passengers and freight in and out of the state by rail. In 1961 Connecticut terminated 6,733,000 tons of freight by rail and originated 2,508,000 tons. The New Haven not only moves passengers north and south on the Boston-Washington rail corridor, but it also provides an essential commuter service into New York City. In 1962 New Haven handled some 10,394,000 passengers between Connecticut stations and New York City alone. (*Id.*)

Rhode Island.

The vital importance of New Haven to Rhode Island is shown by the following passage from the Examiners' report:

> "N.H. is the only Class I railroad serving the State of Rhode Island. Over 50 percent of the population in Rhode Island are employed in the manufacturing industry and such industry is greatly dependent upon rail service provided by N.H., particularly for the inbound movement of raw materials from points outside of New England. In 1962, 35,000 cars were consigned to

or shipped by industries located in Rhode Island via N.H. from which the latter derived $5,000,000 in revenue. Three important naval stations in Rhode Island are located at Newport, Quonset Point and Davisville, and in the Narragansett Bay area, the naval installations employ over 10,000 civilians. In addition to freight service, the N.H. provides an important passenger service in the State, and estimates indicate that approximately 1,200,000 passengers utilizing rail service originate or terminate within the confines of this State annually. Providence, a city with a population of 200,000 and Metropolitan Area of 1,000,000, has water facilities to receive shipments of bulk commodities, but since World War II general freight service by water to and from Providence has been discontinued.

"The Governor of Rhode Island evidenced his concern at the hearing that the failure to include the N.H. in the proposed merger may result in a loss of service provided by N.H. in the State. It was his belief that without such service, the State would have little chance of attracting new industry; that existing industries might relocate their plants and that without rail service, the Federal Government may well determine to reduce or terminate existing defense installations. . . ." (*Id.*, p. 278.)

Massachusetts.

The Commonwealth of Massachusetts is served by three principal railroads, New Haven, New York Central and Boston & Maine. In choosing to take a position in support of merger, the Commonwealth has not overlooked (*a*) the fact that New Haven and the Central now compete for some passenger and considerable freight traffic to and from the

south and west and that merger will obviate whatever benefits are conferred by this competition; (*b*) the potential competitive injury that the merged railroad could inflict upon B&M,[1] which is the principal freight carrier to the east, north and northwest as well as a major commuter road between Boston and its northern and western suburbs. The Commonwealth realizes, however, that, without merger, there will be no New Haven, and without the New Haven her economy would suffer grievously. The Interstate Commerce Commission Hearing Examiners said in their report:

> ". . . Over 50 percent of the inhabitants of New England reside in Massachusetts, and the latter's major manufacturing activities are not dissimilar to those carried on in Connecticut. Major points at which N.H., N.Y.C. and/or B&M compete are Boston, Cambridge, Springfield, and Worcester, all with populations over 100,000.
>
> "Boston, seventh largest metropolitan area in the United States is the largest city in New England and serves as the center for governmental, commercial, educational and cultural activities, and is the major port in this region. Boston is served by N.H., B&M and N.Y.C. The latter serves the east Boston section of the seaport and leases three general cargo piers, an open pier and a one-million bushel grain elevator from the Massachusetts Port Authority. The B&M serves the Charlestown section of the Port and operates two modern general cargo piers and a one-million bushel grain elevator. The N.H. does not operate or lease any piers, but does serve the three largest terminals at the Port in Boston. These railroads directly

[1] The B&M, together with the Erie-Lackawanna and the Delaware & Hudson, was a party to the District Court proceedings to enjoin the merger, but did not appeal from that court's decision.

or indirectly also provide service to the U.S. Naval shipyards, the Boston Army Base and other National Defense facilities in the Boston area." (*Id.*, pp. 275-276.)

Boston is, of course, the northern terminus of the northeast rail corridor. The New Haven also provides an essential commuter service in the Boston metropolitan area.

All three states, or agencies thereof, entered appearances in the merger proceedings at the outset and participated in the hearings held in Boston from May 20 to May 24, 1963. Governer Chafee of Rhode Island testified, and Governor Dempsey of Connecticut and Attorney General Brooke of Massachusetts had statements read on their behalf. Many citizens testified as shippers, or as representatives of community groups. All were primarily concerned that the railroad service provided by the New Haven continue.

After the examiners issued their report recommending the merger with the inclusion of the freight service of New Haven only, the three states filed written exceptions to the failure to include the passenger service and urged this position on oral argument before the full Interstate Commerce Commission. Subsequently, the Trustees attempted, in proceedings before the Interstate Commerce Commission, to abandon all of its interstate passenger service. The three states also energetically opposed this attempt.

The position of the states was vindicated when on April 27, 1966, the Commission announced that the public interest requires that the bulk of New Haven's passenger service be continued and be included in the Penn-Central merger. *New York, New Haven & Hartford Railroad Co., Trustees,*

Discontinuance of All Interstate Passenger Trains, 327 I.C.C. 151, 224-225 (1966). See *Pennsylvania Railroad Company—Merger—New York Central Railroad Co.*, 327 I.C.C. 475, 523-526, decided the same date.

Since that time these three states have supported the merger and the prompt inclusion of New Haven before the United States District Courts for the District of Connecticut (see Appendix B to Br. of New Haven, p. 2) and in the case at bar in the Southern District of New York.

The states have also shown their interest in preservation of New Haven service in more tangible ways. Cash support furnished by the states (including New York) for the continuation of passenger service currently aggregates $6,000,000 per year. In addition, the states have enacted tax-relief measures having an estimated total value of $11,000,000 per year. Thus the present burden borne by the states aggregates $17,000,000 per year.

The States of Connecticut and New York are now implementing an $80,000,000 rehabilitation program designed to modernize rail passenger service in the New York–Connecticut commuter area. Connecticut is co-sponsoring with the United States Department of Commerce the operation of new, high-speed turbine-powered trains along the Connecticut shore-line route of the New Haven, under the Northeast Corridor High Speed Transportation Demonstration program.

V.

Argument.

The District Court neither Abused its Discretion nor Committed an Error of Law in Refusing to Issue an Injunction.

Stripped of verbiage and wrung dry of generalities, the essential contention of all the appellants[2] (except for Milton J. Shapp and the City of Scranton, whose standing in this Court is, to say the least, dubious) is that merger of the Pennsylvania and New York Central may not legally be consummated unless and until protective conditions satisfactory to all the appellant railroads are imposed by the Interstate Commerce Commission and accepted by the parties or approved by the Court. No case or statute cited by the appellants supports this proposition. In their effort to transform their contention from a mere self-serving *ipse dixit* to a creditable legal argument, the appellants rely heavily on the provision of 49 U.S.C. § 5(2)(b), that mergers must be consistent with the public interest, and the provision of 49 U.S.C. § 5(2)(c), that in passing upon a proposed merger the Interstate Commerce Commission shall give due weight to its effect "upon adequate transportation to the public." See, *e.g.*, D&H Bf. 23-25; E-L Bf. 50-52, 60-61; United States Bf. 20-23; C&EI Bf. 30-31.

There is simply no evidence in the entire record, before the Commission or the United States District Court, that consummation of the merger, absent pre-imposed protective conditions, will cause irreparable harm to the public interest. Indeed, counsel for the D&H and the E-L conceded

[2] In view of the brief filed by the Solicitor General, the United States clearly should be regarded as an appellant in these proceedings.

and the Court below noted (A-30) [3] that "some time must pass before the merger would have serious adverse effects on anyone." With this concession the appellants' case evaporates, since, contrary to the interpretation given by the Solicitor General (Bf. 25), the Commission did not initially find that "immediate consummation of the merger would not be in the public interest unless certain conditions were in force." [4] What the Interstate Commerce Commission *has* maintained at all times is that some conditions to protect competitive carriers are a necessity, and by its order of September 16, 1966, the Commission makes it clear that it intends to impose such conditions.

The fallacy of the before-rather-than-after argument is aptly illustrated in the very brief filed by the D&H, which states (Bf. 26):

> "We do not question the Commission's power to reserve jurisdiction to reconsider after merger the efficacy and appropriateness of any protective conditions which it finds prior to consummation of the merger to be necessary in the public interest. See Section 5(9) of the Interstate Commerce Act. What is improper here is the Commission's postponement of the exercise of its duty to establish and impose terms and conditions which are essential to the authorization of this merger until after the merger occurs."

---

[3] References to opinions of the Lower Court are quoted from Appendix A of the Jurisdictional Statement of the B&O.

[4] See 327 I.C.C. 475, 532, stating: "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." The "period necessary to determine their [D&H's and E-L's] future" does not begin with the consummation of the merger.

In effect, what the D&H is saying is that, after merger has been consummated, the Interstate Commerce Commission could change any conditions which it imposed prior to the merger as long as it had gone through the motions of imposing conditions prior to consummation. It would be an unfortunate travesty on the administrative process if administrative bodies could be required to take substantive action merely for the sake of form. If the D&H actually accepted its argument that the public interest required conditions to be in force at the time of the merger, it could not, in the same breath, willingly concede to the Interstate Commerce Commission such broad power to alter these conditions as circumstances demanded. As the D&H implicitly recognizes, the conditions that the Interstate Commerce Commission will impose, when it imposes them, will be neither holy writ nor constitutional sanction. Rather, these conditions will be subject to modification, alteration, amendment, renegotiation and even revocation as the alignment of Eastern railroads shifts and coalesces. To contend that these conditions must be effective at the time of merger even while admitting that they may be inapplicable a year or so thereafter is to argue inconsistent and irreconcilable positions.

On the other hand, the public interest in immediate consummation, particularly from the standpoint of those who rely on the rapidly sinking New Haven, is inherent in the very nature of railroad mergers. If the Penn-Central merger is delayed, there is always the possibility that, in view of the complexity of such mergers, this one will never take place. See Brief of the New Haven Trustees, pp. 39-46. That there is substantial basis for the fear of total abortion of the merger is well illustrated by the sworn testimony of Stuart T. Saunders, Chairman of the Pennsylvania Board of Directors, before the Interstate Commerce Commission

on November 16, 1966, in the reopened hearings on protective conditions. This testimony is reprinted in the Appendix to this brief. In that event, the railroads involved in this proceeding (except for New Haven) will doubtless manage to survive, at least for the foreseeable future. The trustees of the New Haven would have no choice but to carry out their duty under 11 U.S.C. 204, and, albeit reluctantly, liquidate the estate and pay its debts. The States of Rhode Island and Connecticut and the Commonwealth of Massachusetts, however, would end up without essential railroad service, freight or passenger. The resulting losses would be staggering. See *New York; New Haven & Hartford Railroad Co., Trustees, Discontinuance of All Interstate Passenger Trains,* 327 I.C.C. 151, 179-205; *Pennsylvania Railroad Co.–Merger–New York Central Railroad Co.,* 327 I.C.C. 475, 522-527. To the extent that parts of Southern New England served by the New Haven (*e.g.,* Fall River, New Bedford) are already depressed areas and so classified by the Department of Labor, the loss of the railroad might well be the death blow from which they would never recover.

Even if delay, however, does not abort the merger altogether and does not result in the liquidation of the New Haven, it could have serious consequences for the beleaguered Southern New England States. First, this region already suffers from a well-founded popular conception that service on the New Haven is tentative and tenuous. Industries considering location or expansion in this area cannot help being affected by this belief. Until merger has been consummated, Southern New England will continue to lose present and potential business dependent upon railroad service. See page 278 of the Examiner's Report, Appendix B to Brief of D&H. And no matter how long or short the delay in consummation, this loss is certain and irreparable.

Secondly, the same popular conception that results in losses of industry also results in passenger attrition, and for much the same reason. Passenger service on the New Haven is now frequently made unpleasant by "obsolete equipment, inadequate space, insufficient facilities and other disabilities." *New York, N.H. & H. R.R. Co., Discontinuance of All Interstate Passenger Trains, supra,* 157. Neither merger nor even absorption of the New Haven by the Penn-Central will of itself eliminate these conditions immediately, but the absorption of the New Haven into a healthy system willing and able to deal effectively with long-haul passenger problems should encourage present riders to stay with the railroad until conditions improve. This factor is important to Southern New England, because the loss of rail passengers not only results in the clogging of already crowded roads and highways but also makes the problem of establishing future adequate mass transportation in this region so much more difficult.

Thirdly, these states, as already pointed out in the discussion of their interest, *supra,* are spending vast sums of money to support the New Haven, a privately owned utility in which they have no proprietary interest. This money must be diverted from equally pressing needs in the areas of education, health, welfare, urban renewal, cultural enrichment and the myriad other services which the states help support. The longer merger is delayed, the longer these payments must continue, so that what was begun as interim emergency assistance becomes an unending burden.

In short, the states do not ask immediate consummation of merger in order to vindicate form or, in the words of the Court below, to jockey "for position" (A. 39). We rest our case squarely upon the showing of a public interest in this merger, a public interest separate and apart

from that which the District Court spelled out in its opinion (A. 19) and in which these states, together with the general public and the rest of the nation, will share. On these bases both the District Court and the Interstate Commerce Commission could find in immediate consummation of the merger a "direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25. This finding having been made, it is in the public interest that merger not be delayed.

VI.

Conclusion.

That immediate consummation of the Penn-Central merger is in the public interest has been unequivocally demonstrated, and, accordingly, the District Court did not err in refusing to enjoin it. The order of the Court denying an injunction should be affirmed.

Respectfully submitted,

HAROLD M. MULVEY,
Attorney General,
State of
Connecticut,

SAMUEL KANELL,
Special Assistant Attorney General,
Attorneys for the State of Connecticut.

EDWARD W. BROOKE,
Attorney General,
Commonwealth of Massachusetts,

DAVID BERMAN,
Assistant Attorney General,
Attorneys for the Commonwealth of Massachusetts.

J. JOSEPH NUGENT,
Attorney General,
State of Rhode Island,

ROBERT M. SCHACHT,
Assistant Attorney General,
Attorneys for the State of Rhode Island and Providence Plantations.

Of Counsel:

JOSEPH L. TAUBO,
Special Assistant Attorney General,
Commonwealth of Massachusetts,

WILLIAM J. LYNCH,
Assistant Director,
Connecticut Transportation Authority,
State of Connecticut,

F. MICHAEL AHERN,
Assistant Attorney General,
State of Connecticut,

DAVID B. BEIZER,
Assistant Attorney General,
State of Connecticut,

ROBERT L. HIETLE,
Assistant Attorney General,
State of Connecticut.

[Appendix follows.]

Appendix.

STENOGRAPHERS' MINUTES

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. Finance Docket No. 21989, et al.

In the Matter of:

PENNSYLVANIA RAILROAD COMPANY—
MERGER—NEW YORK CENTRAL
RAILROAD COMPANY, et al.

Q [Mr. Bongartz] Mr. Saunders, in the course of your direct testimony, you referred to delays that have been experienced in this merger proceeding.

The delay that has been experienced and is being experienced as a consummation of this merger, pose—does it pose in your opinion any threat to its being ultimately effected?

A [Stuart T. Saunders] Yes, I think it very definitely does.

This merger has been pending before the Commission for almost five years, and, of course, the negotiations between the parties took place before then, so this merger having been pending before the Commission for over 5 years—it will be five years in March of this year—has created tremendous problems, and it is only with the greatest difficulty we have been able to hold this merger together, and I say to you, frankly, and sincerely, that we cannot go on with indefinite delays of this merger.

It is simply impossible to operate these properties in suspense this way. There are so many decisions that have to be made, so many problems that we have, if this merger is delayed for any substantial period of time—or indefinitely, whichever way you want to take it, the merger is going to collapse.

And this is true for a number of reasons.

In the first place, take the matter of personnel. We have attrition rate of over 5,000 people a year on these combined systems. We don't know what to do in many cases about filling these jobs.

There is no necessity for it if the merger goes through, and this runs from the top to the bottom of these railroads.

There is no use in us making a certain man a vice president today and tomorrow he is a vice president, but he hasn't got vice presidential duties, we haven't got that kind of work for him to do.

This runs as I say all through the railroad. Moreover, it creates personnel problems and morale problems in another direction, in that people—we have had people on this railroad now for five years—apparently still don't know when this merger is going to become effective, and they don't know what their jobs are going to be. They don't know where they are going to live and they don't know where they are going to work.

If you can imagine a more demoralizing effect upon employment, or the efficiencies of your employees, and upon the efficiency of your organization, I would like you to name it. It has a tremendous impact.

The Railroads, these railroads, simply cannot be operated at anything approaching top-notch efficiency with a cloud of this sort hanging over its future.

Then, we have the matter of capital expenditures. We have had our capital expenditure programs more or less in suspense for five years.

Of course, there are a lot of programs and expenditures we have to make, we know that regardless of whether the merger is consummated. But there are expenditures and program expenditures running into millions, and over this period, hundreds of millions of dollars, that we don't know whether to make them or not. They could achieve great savings for us, and for the merged system.

But we don't know whether to make these savings. For instance, we have yards that we are holding back on the improvement, because if the merger goes through, we wouldn't have to make those expenditures.

There are any number of projects of that sort. So, when you take into account the problems that are created by indefinite delay, and as I say five years is almost back-breaking, but we simply cannot stand indeterminable delay such as is being brought about by the tactics of the Norfolk and Western Railroad in this procedure; everywhere I go, or everywhere we go, we find the court rooms and the hearing rooms filled with lawyers, and expert witnesses, consultants and college presidents, of the Norfolk and Western Railroad, all designed to do nothing but kill the Penn-Central merger, and Eastern Railroad merger movement, or to dictate the terms, and, as I stated before, on which the Eastern Railroads are going to be re-structured.